IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

SECOND APPEAL NO. 235 OF 1986

Shri Namdeo Dhondiba Sonvalkar ... Appellant (Ori.Plaintiff)

V/s

1. Shri Anyaba Dagadu Sonvalkar (since deceased through his legal heirs and representatives)
1A. Shri Balu Anyaba Sonvalkar
1B. Sou. Indirabai Dajiram Deokate. ... Respondents

Mr. K.B. Sonwalkar for the appellant.

Mr. N.V. Walawalkar for the respondents.

CORAM: P.V. KAKADE, J.

DATED: 6TH DEC., 2004.

P.C.:

1. The appellant has preferred this appeal against the judgment and order passed by the Addl. District Judge, Satara, on 16.7.1985 allowing the appeal preferred by the original defendants decreeing the suit for specific performance as directed by the learned Trial Judge.

The suit lands being Survey Nos. 59/16 and 59/22 admeasuring 26 Ares of village Dudhebavi, Tal. Phaltan, belong to the defendant No.1. He contracted to sell the said land to the plaintiff for consideration of

Rs.10,000/- and executed Sathekhat in his favour on 14.1.1975 and the plaintiff paid Rs.5000/- to the defendant No.1 towards consideration. It was agreed that the sale deed should be executed after obtaining necessary permission for sale and after the land was converted into old tenure. On the date of the said agreement, defendant No.1 gave possession of the lands to the plaintiff. The plaintiff then started cultivating the land. However, defendant No.1 later on changed his mind and avoided to complete the transaction and to obtain permission for sale. The plaintiff served defendant No.1 with a notice to complete the transaction but defendant No.1 did not do so. On 3.5.1976 defendant No.1 also obstructed the plaintiff's cultivation of the land. Thereafter, on 17.10.1977 defendant No.1 executed sale deed in respect of the suit lands in favour of defendant No.2. It is alleged that the said sale deed was hollow and without consideration and as such illegal. The plaintiff, therefore, impleaded defendant No.2 in the suit.

After the agreement, consolidation scheme was made applicable and an area of 24 Ares of S. No. 59/16, 2 Ares from 59/24, 2 Ares from S.No. 59/25 and 4 Ares from S.No. 59/30 remained with defendant No.1 and it

was allotted Gat No.273. The plaintiff has claimed relief of specific performance in respect of the said area of 32 Ares having Gat No.273. According to him, he is entitled to claim the sale deed in respect of the said portion on payment of appropriate price of Rs.7,110/-. He, therefore, brought the suit claiming relief of specific performance and perpetual injunction against both the defendants.

2. Both the defendants filed separate written statements and challenged the suit denying the allegations made by the plaintiff. Defendant No.1 contended that the plaintiff was never ready and willing to perform his part of the transaction and, therefore, it was submitted that the plaintiff was not entitled to specific performance. Defendant No.2 denied the alleged earlier contract between the plaintiff and defendant No.1 and submitted that he is in possession of the suit property and, as such, the suit was sought to be dismissed with costs.

3. The learned Trial Judge heard the suit on merits and came to the conclusion that the plaintiff had proved his case and, therefore, passed the decree for specific performance against the defendant No.1 rejecting the

allegations of defendant No.2 also.

4. Therefore, both the defendants preferred separate appeals against the judgment and order passed by the learned lower Appellate Court. The learned lower Appellate Court Judge adjudicated both the appeals together disposing them of by common judgment holding that the plaintiff had failed to prove his entitlement to the specific performance mainly on the ground that he failed to establish that he was ready and willing to perform his part of the contract and, therefore, it was held that he was not entitled to relief for specific performance as well as perpetual injunction. It was also directed that defendant No.2's claim was also not established and, therefore, was liable to be rejected. Finally, it was directed that defendant No.1 was entitled to the refund of Rs.5000/- from the plaintiff with future interest at the rate of 6% p.a. from the date of the suit till realization. Hence the present appeal is preferred.

5. I have heard learned counsel for both parties and perused the record. It may be noted that, at the time of admission of the appeal, the substantial question of

law was raised to the effect that the defendant-appellant never pleaded that the plaintiff was not ready and willing to perform his part of the contract and the lower Court had not even raised any issue to that effect and, therefore, the said issue was raised for the first time by the lower Appellate Court Judge and thus therefore what was the effect of the situation. In other words, the question of law was sought to be raised to the effect that if the Trial Court had not raised the issue regarding readiness and willingness to perform part of the contract on behalf of the plaintiff, then whether the lower Appellate Court was entitle to raise such question and adjudicate the appeal on that count itself. The learned counsel for the appellant vehemently urged that the learned Trial Judge did not raise any issue whether the plaintiff was ready and willing to perform his part of the contract while claiming specific performance of the suit agreement and, therefore, it was raised by the lower appellate Court for the first time and in fact the dispute was adjudicated on that basis holding that the plaintiff had not shown his readiness and willing to perform his part of the contract and, as such, he was not entitled to any specific performance. Therefore, on this basis it was submitted that when such issue was

never raised, the appellant-plaintiff had no opportunity to meet this issue and, therefore, the appeal was entitled to be allowed on that count alone. In this regard, it must be noted that, all the issues raised in the course of the trial, were in fact issues of facts which were adjudicated by the learned Trial Court, however, in the appeal before the lower appellate Court, the learned Appellate Court Judge specifically raised the point to the effect that whether the plaintiff was ready and willing to perform his part of the contract and on the basis of the available evidence he held that the plaintiff had failed to establish that he was ready and willing to perform his part of the contract before claiming the relief of specific performance.

6. The perusal of the judgment of the lower appellate Court clearly shows that it is amply demonstrated with the aid of the evidence on record that, in the suit notice the plaintiff contended that after the agreement, he paid to defendant No.1 a sum of Rs.678/- from time to time, however, this payment was not proved by the plaintiff and, therefore, by necessary implication it was demonstrated that he was ready to pay the only balance after deduction of the said amount and, therefore, if it is so, then it cannot be said that the

plaintiff was ready to perform his part of the contract. It was further held that, when there is plea of part payment with averment that the plaintiff is ready and willing to pay the balance and, such plea of part payment fails, then the plaintiff cannot be held to be ready and willing to perform his part of the contract continuously between the contract and the date of hearing of the suit. Obviously, it is for the plaintiff to prove his continuous readiness and willingness when he pleaded part payment. He cannot be held to be ready to pay the amount claimed to have been paid and then plea of such payment fails to be established and, therefore, it must be held that the plaintiff failed to prove that he was ready and willing to perform his part of the contract and, as such, he was not entitled for specific performance of the contract.

7. In this regard, the learned counsel for the respondents sought to put reliance in the case of **Ram Kumar Agarwal v/s Thawar Das, reported in (1999) 7 SCC 303,** wherein it was held that when a person who falsely claims to have paid a sum of money and attempts to prove the plea at trial stage, then it cannot be said to have been ever ready and willing to pay the sum due under the contract in question. However, it is needless to

mention that the person who comes with the case for specific performance of the contract, the readiness and willingness to perform his part of the contract as introduced in the deed itself and, therefore, it is the duty of the plaintiff to prove on his part that he was ever ready and willing to perform his part of the contract. When the lower Appellate Court Judge, on available evidence has come to the conclusion that there was element of part payment made by the plaintiff i.e. amount of Rs.678/-, as can be seen from the suit notice, then such payment was required to be duly esdtablished by the plaintiff and, as such, when plaintiff fails to establish this payment, then it cannot be said that the plaintiff has established his plea that he was ready and willing to perform his part of the contract.

So far as appreciation of factual evidence is concerned, I am of the view that this Court cannot go into that aspect in the second appeal as contemplated under Sec. 100 of the C.P.C. However, the only question for my consideration is to the effect that, whether the lower Appellate Court Judge was right in raising the impugned question in the appeal when no such issue was raised by the Trial Court Judge. I am of the view that the issue whether plaintiff was ready and willing to perform his

part of the contract is introduced in the dispute itself, especially when the plaintiff has come with a case that he was always ready and perform his part of the contract and, therefore, I hold that the lower appellate Court Judge has not erred in raising such issue and adjudicating it on available factual evidence on record.

8. In the result, I hold that there is no merit in the appeal and thus it is liable to be dismissed. Hence, the appeal is dismissed in limine with no order as to costs. However, the appellant shall be entitled to the refund of the amount of Rs.5,000/- paid by him to the defendant No.1.

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